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67/11/13 Brief of National District Attorneys Assocation Amicus Curiae, in support of Respondent

Harry Wood

Harry E. Sondheim

Brenden T. Byrne

Charles Moylan Jr.

Evelle T. Younger

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 67

JOHN W. TERRY, et al., *Petitioners,*

—vs.—

STATE OF OHIO, *Respondent.*

BRIEF OF NATIONAL DISTRICT ATTORNEYS ASSOCIATION, AMICUS CURIAE, IN SUPPORT OF RESPONDENT.

BRENDAN T. BYRNE,
Essex County Prosecutor,
Court House
Newark, New Jersey 07102

CHARLES MOYLAN, JR.
States Attorney
City and County of Baltimore
304 Court House
Baltimore, Md. 21202,

EVELLE T. YOUNGER,
District Attorney,
Los Angeles County,
600 Hall of Justice,
Los Angeles, Calif. 90012,

Amicus Curiae, Committee for the National District Attorneys Association.

Of Counsel:
HARRY WOOD
Chief, Appellate Division

HARRY E. SONDHEIM,
Deputy District Attorney
Los Angeles County
600 Hall of Justice
Los Angeles, Calif. 90012

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Miscellaneous

Statutes

Textbooks

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BRIEF OF NATIONAL DISTRICT ATTORNEYS' ASSOCIATION, AMICUS CURIAE, IN SUPPORT OF RESPONDENT.

Reasons for Filing an Amicus Curiae Brief.

For the reasons set forth below, the National District Attorneys' Association, with the consent of all counsel in this case (see letters on file with the Clerk of the Court), has filed this brief.

One of the basic issues underlying the instant case, as well as two companion cases, *Sibron v. N.Y.*, No. 63, and *Peters v. N.Y.*, No. 74, is whether the Fourth Amendment prohibits the police practice of temporarily detaining persons in the "field"[1] on any standard[2]

[1]We define the contept of "temporary field detention" in Part I *infra* of our argument.

[2]As is explained in Part I *infra*, we do not urge any particular formula for the constitutional standard upon this Court, but merely that the standard can be less than "probable cause to arrest," which is the standard urged by petitioner Terry. (See Brief for Petitioner, p. 13.)

less than probable cause to arrest. Our concern is with the broad implications of this issue, not with its particular application to any given factual situation. Consequently, what we say herein will have relevance to the two cases arising from New York to the extent that the ultimate disposition of these cases touches upon the basic issue which we discuss herein. We have chosen, however, the instant case as the means for expressing our views because we feel that it permits a broader consideration of the problem than may otherwise be permitted by the New York cases.

After considering whether the Constitution prohibits temporary field detention on a standard less than probable cause to arrest and assuming the Constitution does not, we next consider whether the Fourth Amendment prohibits a protective patdown[3] incidental to such a detention. Then, we consider the admissibility of physical evidence resulting from the protective patdown.[4]

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[3]We define the concept of "protective patdown" in Part I *infra* of our argument.

[4]We limit our consideration to the admissibility of such physical evidence, as distinguished from statements obtained during the temporary detention, because of the factual context in which each of the three cases now pending before this Court has arisen. In each of these three cases the issue is whether or not physical evidence obtained as the result of a patdown was properly admissible at the trial on the issue of guilt or innocence. Collaterally, in determining whether the procedures leading to the patdown and the patdown itself do not run afoul of the Fourth Amendment, it may be necessary to consider whether statements obtained prior to the patdown are admissible in determining the propriety of the conduct in light of the Fourth Amendment. Thus, in the instant case the petitioner, Terry, gave a "mumbled response." 5 Ohio App. 2d 122, 123-24, 214 N.E. 2d 114, 116 (1966). In the *Peters* case the petitioner's response was characterized by the Court of Appeal as "apparent chivalry." 18 N.Y. 2d 238, 241,

The reasons that the National District Attorneys' Association is interested in each of the three issues set forth above is that the procedures termed herein as "temporary field detention" and "protective pat-down", as well as the admissibility of evidence obtained thereby, have received recognition and approved in various states for which members of the Association are counsel[5] and are thus used by counsel in processing criminal cases. Furthermore, as will also be set forth with more particularity in the course of our argument,[6] these procedures have an important bearing upon the proper role of police in our society and thus will affect the legal advice given to police officers by the various prosecuting attorneys who are members of the Association.

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219 N.E. 2d 595, 597, 273 N.Y.S. 2d 217, 219 (1966). While this is an important issue which has Fifth Amendment aspects, it need not be considered herein since it appears that these cases would not be a proper vehicle for deciding such an issue since it has not apparently been raised by the petitioners in any of the three cases, nor was it decided by the state courts below. In any event, if the basic underlying right to conduct a temporary field detention on a standard less than probable cause to arrest is sustained, the right to question would appear to be an integral part of such detention which would not be subject to Fifth Amendment incrimination since this type of detention does not constitute deprivation of freedom of action in a "significant way." *Miranda v. Arizona,* 384 U.S. 436, 444 (1966). Rather it constitutes "general on-the-scene questioning as to facts surrounding a crime or general questioning of citizens in the fact-finding process" which was "not affected by" the holding of *Miranda.* 384 U.S. at 488.

[5]See discussion in II,A,2, and III *infra* of this brief.

[6]See discussion in II,A,1, II,A,3 and II,B *infra* of this brief.

SUMMARY OF ARGUMENT.

I.

Semantics.

Definition of the terms "temporary field detention" and "protective patdown," as well as indicating the proposed solution to the use of these police investigative devices.

We urge that a constitutional standard for these two investigatory techniques be adopted without specifically setting forth any particular formula for such standard in order that each state may have sufficient flexibility to develop its own semantic definition and conceptual underpining of that standard. This Court would thus play the same role in determining whether that standard has been met, as it does in determining whether or not probable cause for a search warrant or an arrest exists, namely, review of each case to determine whether the standard established by the state and applied to the facts of the case comply with the Constitution.

II.

Temporary Field Detention, Protective Patdown and the Admissibility of Evidence.

Based upon (1) society's need for the investigatory techniques of temporary field detention and protective patdown, (2) upon the acceptance of these techniques by society, (3) upon the recognition that the abuse of power by unscrupulous police officers will not be eliminated or reduced by eradicating these techniques

at the expense of those officers who conscientiously attempt to comply with the Constitution, and (4) upon the interpretations given to the Fourth Amendment by this Court in the past, we contend that evidence obtained by the proper use of these techniques is admissible in a state trial.

III.

California.

The State of California, in a sense, is an experimental laboratory in which the judiciary has been able to impose constitutional standards with respect to these techniques which distinguish lawful police investigatory techniques from abuse of power, while protecting both the individual citizen and society as a whole.

ARGUMENT.

I.

SEMANTICS.

The phrase "temporary field detention" is used herein to mean those situations in which a citizen is stopped by a police officer for investigation in the field while either a pedestrian, or occupant of a vehicle at a time when the officer stopping the citizen does not have probable cause to arrest the citizen.[7] It thus includes the so-called "stop" part of "stop and frisk." We use the phrase "protective patdown" to indicate a cursory running of the officer's hands over the outer garments of a person who is stopped which may lead to a search of what is contained in the garments if the cursory patdown discloses the possible existence of a weapon which could be harmful to the officer. We use this phrase to make clear that we are supporting the use of a cursory search of an individual only in those situations where the facts known to the police officer indicate it is necessary for the protection of the officer and not in those situations where it is used as a subterfuge for an exploratory search.

Much of the literature, both from the commentators and the courts, relating to the problems of temporary field detention and protective patdown involves, in part, semantic analysis.[8] It is quite clear that a distinction

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[7]This brief is not intended to condone or support detentions at a police station "for investigation," where probable cause to arrest did not exist at the time the suspect was taken to the station.

[8]Thus in *State v. Harbatuk*, 95 N.J. Super. 54, 229 A. 2d 820 (1967), the concept of detention was distinguished from arrest; and see Foote, *The Fourth Amendment: Obstacle or Necessity in the Law of Arrest*, 51 J. CRIM. L.C. & P.S. 402, 402-03 (1960), for further semanticism.

can be drawn both historically[9] and practically[10] between an arrest and a detention, as well as between a protective patdown and a search. By narrowing the concept of the words "search" or "seizure" as contained in the Fourth Amendment to only arrest and intensive search situations one can completely eliminate the problems posed by the trilogy of cases now pending before the Court. However, we propose to assume, without conceding, that a temporary detention is encompassed by the concept of a seizure (although not within the concept of an arrest) and a frisk is encompassed by the concept of a search within the meaning of the Fourth Amendment.[11] However, this does not mean that the only searches or seizures authorized by the Fourth Amendment are those for which there is probable cause to arrest, or consent or a warrant.[12] Indeed, this assumes the answer to the issue in the same way as does one who says a detention is not an arrest.

An additional area of possible semantic misunderstanding relates to the test which must be met in order for a temporary field detention to be valid, if a standard less than probable cause for an arrest is permissible. This standard has received various semantic ex-

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[9]A probative analysis of the historical distinction between arrest and detention (as well as of other problems inherent in the trilogy of cases before this Court) can be found in Leagre, *The Fourth Amendment and the Law of Arrest,* 54 J. CRIM. L.C. & P.S. 393, 406-11 (1963).

[10]While it may be inconvenient for a citizen to be detained, it is certainly less inconvenient than being arrested and taken to jail.

[11]This appears to be the basis for the discussion of the constitutional right to detain in Leagre, *supra* note 9.

[12]This is discussed in our brief in II,A,4 *infra* and in Leagre, *supra* note 9.

planations, such as "reasonably suspects,"[13] "reasonable ground to suspect,"[14] et cetera, all of which, however, are based upon the same premise, namely, that some standard less than probable cause to arrest is acceptable. We propose not to define this standard in this brief since it may differ semantically from state to state. Rather, we shall use the phrases "constitutional standard for temporary field detention" and "constitutional standard for protective patdown" (or similar conceptionalization) in the belief that each state should be free to adopt whatever terminology it desires as well as the conceptual bases underlying this terminology so long as such terminology and the underlying concepts when applied to a particular factual situation, are consistent with the standard required by the Constitution.

Thus it is our hope that this Court will recognize the existence of a constitutional standard for temporary field detention (which is less than probable cause to arrest) and for protective patdown, and will not preclude the states "from developing workable rules governing"[15] temporary field detention and protective patdown "to meet 'the practical demands of effective criminal investigation and law enforcement' in the States."[16] Thus this Court would overturn only those cases in which a particular temporary field detention or protective patdown was unconstitutional.

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[13]N.Y. Code Crim. Proc. § 180-a (McKinney Supp. 1966).
[14]Uniform Arrest Act § 2.
[15]*Ker v. California,* 374 U.S. 23, 34 (1963).
[16]*Ibid.*

II.

GRANTING THE POLICE THE RIGHT OF TEMPORARY FIELD DETENTION AND PROTECTIVE PATDOWN ON A STANDARD LESS THAN PROBABLE CAUSE TO ARREST IS THE ONLY EFFECTIVE WAY TO MEET "THE CHALLENGE OF CRIME IN A FREE SOCIETY."[17]

A. Temporary Field Detention.

1. The Role of Temporary Field Detention in the Prevention and Investigation of Crime.

The three cases now pending before this Court are demonstrative evidence of the role of temporary field detention in meeting the challenge of crime by preventing the commission of serious criminal activity. Thus, in the instant cases it is reasonable to infer that petitioner Terry was prevented from engaging in an armed robbery, petitioner Sibron was prevented from engaging in housebreaking, and petitioner Peters was prevented from engaging in the sale of narcotics. This is undoubtedly an important task for the police to perform.[18] Indeed, the need for the prevention of crime, in addition to the apprehension of criminals who have already committed crimes, is evident from the fear for

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[17]Title of the 1967 report submitted by the President's Commission on Law Enforcement and Administration of Justice.

[18]"It is better to have an alert police force that prevents the crime than one that devotes its time to seeking to identify the assailant after the life has been taken, the daughter ravished, or the pedestrian slugged and robbed." Wilson, *Police Arrest Privileges in a Free Society: A Plea for Modernization,* 51 J. CRIM. L.C. & P.S. 395, 398 (1960).

personal safety felt by citizens regarding walking alone in their neighborhood after dark.[19]

An additional important aspect of the role of temporary field detention which is not apparent from the facts of the instant cases is the use of such detentions for apprehending persons who have already committed crimes, independent of those discovered during the detention.[20]

The use of this method by the police is widespread and has been found by them to be effective both in preventing and investigating crime.[21] As noted in the

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[19]See NATIONAL OPINION RESEARCH CENTER, REPORT TO THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *Criminal Victimization in the United States: A Report of a National Survey* (hereinafter referred to as *Field Surveys II*) 72-74 (1967).

[20]See, *e.g., Bell v. United States,* 280 F. 2d 717 (D.C. Cir. 1960) where officers, hearing screams for help at 4:30 a.m. and seeing defendant running near the point from which the screams had come, detained defendant for purposes of checking on the distress call. Had the officers not stopped him, his identity might never have been known and subsequent apprehension entirely frustrated thereby. See also *Wilson v. State,* .... Miss. ...., 186 So. 2d 208 (1966), in which a highway patrol officer, having received a radio call to be on the lookout for a light-colored Plymouth station wagon in connection with a burglary, observed one parked outside a restaurant and requested the occupants to wait a few minutes in order to speak with a sheriff's deputy who was investigating the case. The deputy, arriving shortly thereafter, found sufficient evidence to constitute probable cause for arrest. Again, it is possible, if not likely, that without the detention ultimate apprehension of the perpetrators would not have occurred.

Indeed, of the 23 cases in the appendix to this brief, only 5 are *not* of this type. These 5 are *Shipley v. State,* 243 Md. 262, 220 A. 2d 585 (1966), *People v. Peters,* 18 N.Y. 2d 238, 273 N.Y.S. 2d 217, 219 N.E. 2d 595 (1966), *State v. Terry,* 5 Ohio App. 2d 22, 214 N.E. 2d 114 (1966), *Kavanagh v. Stenhouse,* 93 R.I. 252, 174 A. 2d 560 (1961), *Wilson v. Porter,* 361 F. 2d 412 (9th Cir. 1966).

[21]See MICHIGAN STATE UNIVERSITY, REPORT TO THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *A National Survey of Police and Community*

Task Force Report: The Police, prepared by the President's Commission on Law Enforcement and Administration of Justice:

> "The police consider field interrogations to be an important method of preventing and investigating crime, since they rarely encounter a crime in progress. Normally, by the time a police officer has

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Relations (hereinafter referred to as *Field Surveys V*) 327-31, 333 (1966). See also La Fave, *Detention for Investigation by the Police: An Analysis of Current Practices,* WASH. U. L.Q. (1962) 331, wherein it is stated at 336:

> "This practice, referred to by the police as 'field interrogation,' may be accompanied by a frisk of the suspect when the officer deems it necessary for his own protection. Reports are often made of these field interrogations, which may later prove most useful; for example, if a burglary is later reported in the area where the suspicious person was found, the police then have a particular suspect who can be investigated further."

Thus, for example, we are informed by the Los Angeles Police Department that it recently inaugurated a system which computerized field detention interrogation cards made out after a person in a vehicle has been stopped for field interrogation or arrested. Solely on the basis of leads obtained from the computerized field identification cards for such vehicle stops, 175 felony crimes, involving 67 persons who were not arrested at the time of the field interrogation, were solved and led to the filing of felony complaints against 48 of these defendants (in some instances felony charges were not filed because, for example, the defendant was already involved in other criminal charges or the victim refused to prosecute). The solution of these crimes resulted from the utilization of field interrogation cards from four divisions of the Los Angeles Police Department during the period January 1, 1967, to November 1, 1967. Because of the success of this program it is now being expanded to include all 16 divisions of the Los Angeles Police Department. However, for purposes of meaningful statistics, it is impossible to determine how many field interrogation cards were filled out in situations where the police did not have probable cause to arrest at the time of the initial stopping since such cards are made out on any "good suspect," irrespective of whether probable cause for his arrest existed at the time of his initial stopping. It is clear, however, that as to these 67 defendants such probable cause did not exist since they were never arrested at the time of their initial detention. Unfortunately, the work of the Los

(This footnote is continued on the next page)

> arrived at a crime scene, the perpetrator has fled, people have gathered, and confusion has ensued. Further, the police believe that they can prevent much crime if they are permitted to stop and question persons whose behavior strongly suggests that a criminal act is being contemplated." (pp. 183-84.)

Although the need for some investigation as to the usefulness of this procedure was recognized in one of the studies underlying the *Task Force Report* on the police,[22] unfortunately no such study was ever conducted nor have we been able to find any probative inquiry with respect to the actual amount of crime either prevented or solved as the result of the temporary field detention technique. However, the mere fact that statistical analysis is not available which would indicate the exact percentage or quantity of crime prevented or solved does not mean that the need for temporary field detentions is based on mere speculation. (See the second paragraph of footnote 21, *supra,* for evidence of the usefulness of field interrogation in solving crime

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Angeles Police Department has not been geared for statistical purposes to ascertain the percentage or number of persons who are stopped in situations wherein probable cause to arrest does not exist, but who are eventually arrested upon the basis of probable cause developed during the course of the temporary field detention or developed later on the basis of leads derived solely from that detention.

[22]See *Field Surveys V, supra* note 21, wherein it is stated at 336:

> "Second, because of the critical nature of the field interview contact, would it not seem consistent to evaluate the practice in terms of the usefulness of the information gained? Does it really, as speculated, enable an investigator to place an occurrence or individual in a time-place context for the purpose of successfully conducting inquiry? No evaluation of this type seems to have been available! It should be given some thought."

which, however, cannot be transformed into any statistical percentage.)

First, the experience of the police has indicated to them that it is a necessary technique and this certainly should have some weight in determining whether or not it is required in society, albeit police perception of this need may not be subject to the same critical analyses which underlie some of the surveys prepared for the President's Commission on Law Enforcement and Administration of Justice.

Second, as will be set forth in the succeeding portion of this argument, even those outside of law enforcement who have considered and studied the need for this technique have concluded that such technique is required in society.[23] The existence of overwhelming, unanimous judicial and legislative authority in support of this practice in 17 state jurisdictions and 7 circuits of the Courts of Appeals is the type of evidence which has previously been deemed "pragmatic evidence of a sort"[24] in situations where "it cannot positively be demonstrated that enforcement of the criminal law is either more or less effective under either rule [the exclusionary rule]."[25]

Third, we submit that it would be extremely reckless to strike down this technique *merely* on the assumption that, because its quantitative usefulness has not been determined with exactitude, it is not a technique worth saving for society. If this assumption proved later to be wrong, the results could be disas-

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[23]See II,A,2 *infra.*

[24]*Elkins v. United States*, 364 U.S. 206, 218 (1960), wherein this Court considered the experience of both federal and state courts in applying the exclusionary rule.

[25]*Ibid.*

trous in regard to society's ability to meet the challenge of crime. We suggest, therefore, that a more appropriate way of approaching this problem is to accept the role of this technique in our society until such time as its usefulness has been adequately disproved and to determine whether its role in society can be sustained without infringing upon constitutional protections afforded to citizens by the Fourth Amendment.

Before concluding our discussion of ohe importance of temporary field detention to society in its struggle against crime, we wish to point out a basic distinction between the recognition of this interest in deciding questions relating to the Fourth Amendment and those relating to the Fifth Amendment. We are aware that in *Miranda v. Arizona,* this Court indicated that the need for a police technique cannot be weighed against the privilege afforded by the Fifth Amendment because that privilege is absolute.[26] The Fourth Amendment, however, by its very terminology, makes it clear that it is not absolute since it uses the word "unreasonable," thereby recognizing that some searches and seizures are reasonable. Thus in construing the scope of the Fourth Amendment this Court must apply a balancing test.

To describe conduct as "unreasonable" is a value judgment, not a statement of objective fact.[27] Once

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[26]384 U.S. 436, 479-80 (1966).

[27]In *Rabinowitz v. United States,* 339 U.S. 56 (1950), the Court states:

> "What is a reasonable search is not to be determined by any fixed formula. The Constitution does not define what are 'unreasonable' searches and, regrettably, in our discipline we have no ready litmus-paper test. The recurring questions of the reaonableness of searches must find resolution in the facts and circumstances of each case." 339 U.S. at 63.

a search or seizure is deemed to be unreasonable under the Fourth Amendment, certainly the interests of law enforcement can never justify violation of that guarantee. However, in judging whether a particular search or seizure is reasonable, the interest of society in effective law enforcement must be weighed against other interests, such as privacy and the desire to continue on one's way. Indeed, this Court, in interpreting the Fourth Amendment, has given recognition to the needs of law enforcement.

As this Court stated in *Elkins v. United States*:[28]

> "It must always be remembered that what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures. . . . [I]t can fairly be said that in applying the Fourth Amendment this Court has seldom shown itself unaware of the practical demands of effective criminal investigation and law enforcement."[29]

2. The Use of Temporary Field Detention Has Received Overwhelming Support From Society.

Almost without dissent every judicial body that has considered the question of whether or not it is constitutionally permissible for the police to engage in the practice of temporary field detention has upheld this practice. We have set forth in an appendix to this brief the 16 states and 7 federal circuit courts of appeals in which appellate courts have considered and upheld this practice. We have listed for each jurisdiction one recent leading case, even though there may be additional cases supporting this practice from each jurisdiction. Additionally, if a statute has been enacted in a ju-

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[28]364 U.S. 206 (1960).

[29]*Id.* at 222.

risdiction, we have included the citation to the enactment. In addition to the 16 states which have upheld this practice by judicial decision, one jurisdiction has a statute authorizing the practice but there appears to be no case interpreting the constitutionality of the statute. We have found no jurisdiction which has struck down the practice of temporary field detention. In short, judicial support for the retention of this practice is unanimous in this country.

The two national bodies which have most recently engaged in studies in this field have concluded that the practice of temporary field detention should be retained in our society. Thus, the American Law Institute recommends the enactment of legislation recognizing the lawfulness and necessity of this practice.[30] The President's Commission on Law Enforcement and Administration of Justice recommends the continuation of this practice as follows:

> "If the police were forbidden to stop persons at the scene of a crime, or in situations that strongly suggest criminality, investigative leads could be lost as persons disappeared into the massive impersonality of an urban environment. Yet police practice must distinguish carefully between legitimate field interrogations and indiscriminate detention and street searches of persons and vehicles.
>
> *"The Commission recommends:*
>
> State legislatures should enact statutory provisions with respect to the authority of law enforcement officers to stop persons for brief question-

[30]See ALI CODE OF PREARRANGEMENT PROCEDURE § 2.02 (Tent. Draft No. 1, 1966).

ing, including specifications of the circumstances and limitations under which stops are permissible.

"Such authority would cover situations in which, because of the limited knowledge of a policeman just arriving at the scene, there is not sufficient basis for arrest. Specific limitations on the circumstances of a stop, the length of the questioning, and the grounds for a frisk would prevent the kind of misuse of field interrogation that, the Commission study also indicated, occurs today in a substantial number of street incidents in some cities."[81]

Finally, it should be noted that while empirical data underlying the Commission's study appears to be rather limited and the circumstances under which the data was collected may be open to some close scrutiny, it appears that an overwhelming majority of citizens interviewed did favor at least the right to stop a person and ask his name and address when he is anywhere outside his home.[82] Of course, we recognize that a

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[81]THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 95 (1967). See also THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 183-85 (1967), wherein it is stated at 184: "The Commission believes that there is a definite need to authorize the police to stop suspects and possible witnesses of major crimes, to detain them for brief questioning if they will not voluntarily cooperate, and to search such suspects for dangerous weapons when such a precaution is necessary."

[82]See THE UNIVERSITY OF MICHIGAN, REPORT TO THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *1 Studies in Crime and Law Enforcement in Major Metropolitan Areas,* Section II (hereinafter referred to as *1 Field Surveys III,* Section II) 88 (1967), which indicates that 79% of the residents interviewed would give the police this right, independent of whether or not the officer believed the person stopped had actually committed a crime.

substantial portion[33] of the citizens that would permit such stopping and questioning indicated that this right would depend on the circumstances.

Perhaps the answer most representative of our society, including the court decisions and national bodies referred to above, would be the following statement, given as a representative comment from personal interview data regarding the practice of temporary field detention:

> " '. . . practice is o.k., but the way it was carried out was unfriendly, abusive, etc. Not against method, but how it is used.' "[34]

3. An Absolute Prohibition Upon Temporary Field Detention Will Only Penalize Law Enforcement Officers Who Are Conscientiously Attempting to Comply With the Law, While at the Same Time Affording No Substantial Benefits to Those Whose Rights May Presently Be Violated.

It is apparent that while the judiciary, the various national bodies that have recently studied this problem and the citizenry interviewed support the practice of temporary field detention, it is a practice which is susceptible to abuse. We do not condone or in any way lend our support to the misuse of this practice. What we do urge is that this practice should receive judicial recognition by this Court to the extent that it is not abused. We proceed now to discuss why entire elimination of the practice will not eliminate the abuse to which it is presently susceptible.

While there may be some police officers who abuse their right to utilize temporary field detention, others

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[33] *Ibid.* (The figure given is 23%.)

[34] See *Field Surveys V, supra* note 21, at 334.

have conscientiously attempted to comply with the law and, because of such compliance, are not creating any resentment within the environment in which they operate. The most graphic example of the possible extremes to which the practice of temporary field detention can be pursued is evident from *Field Surveys IV* of the study underlying the *Report to the President's Commission on Law Enforcement and Administration of Justice*. That study indicated that whereas in San Diego field interrogation was a primary target of citizen complaint, in Philadelphia it was not a focal point of such cricitism.[35]

The following is the explanation given in the survey for the lack of controversy regarding this practice in Philadelphia:

> "As commented on above, the field interrogation procedure has provided little cause for controversy in Philadelphia. This may be due to a rational use of the tactic without compulsory overtones, such as official or unofficial 'quotas'. Its apparent acceptance may also partly be due to the fact that it may not be noticed as much in a large, sprawling eastern city as it is in a smaller, more compact western municipality. Another reason the public may not object to field interrogations is that the Philadelphia Police Department has demonstrated that it is not a tool designed exclusively to oppress minority group members."[36]

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[35]THE UNIVERSITY OF CALIFORNIA AT BERKELEY, REPORT TO THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *2 The Police and the Community*, (hereinafter referred to as *2 Field Surveys IV*) 170 (1966).

[36]*Id.* at 173.

If the right to engage in temporary field detention is judged unreasonable because it may be abused, there would be no police procedure which could not be judged unreasonable upon the same ground. Indeed if possibility of abuse is justification for holding unconstitutional a police practice based upon the exercise of judgment by a police officer, *Mapp v. Ohio*[37] did not reach the problem it was designed to solve, namely, unlawful searches and seizures. Such unlawful conduct is still present in our society, as is evident from the reported cases.[38] To carry the "logic of possible abuse" to its rational conclusion, should arrests only be permitted if based upon warrants of arrest because some arrests presently are being made by police officers who exercise their judgment based on facts which the courts sometimes find do not constitute probable cause for the arrests? We submit that if the exclusion of evidence obtained as an incident of an unlawful arrest is a sufficient deterrent to unlawful arrests,[39] why should not the exclusion of evidence obtained as an incident of a temporary field detention which does not meet the constitutional standard for such detention also be a sufficient deterrent to its abuse?

Thus, if the practice of temporary field detention is judicially limited to its reasonable exercise, all that this Court will have done is to legalize its proper use, not its abuse. Indeed, to prohibit it entirely because

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[37]367 U.S. 643 (1961).

[38]See, *e.g.*, *Stoner v. California*, 376 U.S. 483 (1964).

[39]"Only last year the Court itself recognized that the purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.' *Elkins v. United States, supra*, at 217." *Mapp v. Ohio*, 367 U.S. 643, 656 (1961).

of its abuse while failing to give recognition to its proper use "is to burn the house to roast the pig."[40]

Furthermore, prohibiting this practice entirely will not alleviate the present abuse to which it is susceptible. Studies indicate that there are already in existence a number of police practices which could very readily take the place of the abuse of temporary field detention. Thus, instead of merely detaining a person in the field for investigation, he could be brought down to the station and arrested "for investigation"[41] or he could be arrested on some charge not directly related to that which the police officer is investigating.[42]

As noted by one commentator:

> "Pressure may be placed on the police to make arrests too early in the investigative process."[43]

This Court recently attempted to alleviate such pressure in another aspect of search and seizure when it stated:[44]

> "The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon,

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[40] *Butler v. Michigan,* 352 U.S. 380, 383 (1957).

[41] See *Field Survey V, supra* note 21, at 336 wherein it is stated:

> "Although arresting an individual for investigative purposes, even on the basis of a specific suspected offense, is patently questionable, the practice is nevertheless widespread and fairly common."

[42] PERKINS, ELEMENTS OF POLICE SCIENCE 297 (1942). See. Note. *Philadelphia Police Practices and the Law of Arrest,* 100 U.PA.L.REV. 1182, 1205 (1952), regarding the "vagrancy dodge."

[43] Barrett, *Personal Rights, Property Rights, and the Fourth Amendment,* SUP. CT. REV. (1960) 46. 65-66.

[44] *Hoffa v. United States,* 385 U.S. 293, 310 (1966).

and a violation of the Sixth Amendment if they wait too long."[45]

In short, we submit that present interpretations of constitutional magnitude have not necessarily eliminated unlawful police practices. The officer who would harass and abuse is doing so now; the conscientious officer is not. If a police officer wants to roust someone, he will continue to do so irrespective of whether the practice of temporary police detention is judicially prohibited. The officer who would engage in abuse can justify his activities under present law and even support them with perjured testimony where necessary. Thus, granting the conscientious officer this additional alternative will not increase the excesses of the officer who is already abusing the powers of his office.

Should temporary field detention be upehld by this Court, the judicial review of its exercise will serve to educate the police as to the propriety of their conduct in the field, a function of undoubted importance insofar as those police officers who attempt to conscientiously obey the Constitution are concerned. On the other hand, total prohibition of temporary field detention would remove the opportunity for courts to define circumstances which constitute an abuse of this practice, affording the conscientious officer no guidance whatsoever as to what he should do in the proper prevention and investigation of crime in the field, while in no way restraining those officers who would abuse their office irrespective of constitutional protections.

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[45]To fail to alleviate the pressure to arrest surrounding circumstances which warrant investigation, but which are short of probable cause to arrest, can only further immortalize a line from Gilbert and Sullivan: "A policeman's lot is not a happy one." *Pirates of Penzance, Act II* (Sergeant of Police).

Furthermore, we submit that just as elimination of this practice will not aid those whose rights are truly abused in the field, it will not aid them in their attempts to obtain recourse from the courts for such abuse. As recently stated by one of the commentators:

> "Pressure may be placed on the courts to water down the standards for probable cause to make formal arrests in order to avoid freeing obviously guilty defendants because of relatively minor invasions of their privacy."[46]

Indeed, this Court recently had occasion to note a similar "watering down" experience relating to the admissibility of mere evidence. As noted in *Warden v. Hayden,*[47] the various courts of appeals, being bound by the rule of *Gouled v. United States,* 255 U.S. 298 (1921), had been compelled to stretch the concepts of instrumentalities of a crime or means used to commit a crime in order to include the recovery of physical evidence which might otherwise have been classified as mere evidence.[48] We would hope that similar confusion would not result in the law relating to probable cause for an arrest because of a failure by this Court to recognize the need for temporary field detention.

4. Temporary Field Detention Is Constitutional Without Probable Cause to Arrest.

Probable cause to arrest is often deemed to have some magic quality of clairvoyance.[49] We submit

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[46]Barrett, *supra* note 43, at 66.

[47]387 U.S. 294 (1967).

[48]*Id.* at 309: "Pressure against the rule in the federal courts has taken the form rather of broadening the categories of evidence subject to seizure, thereby creating considerable confusion in the law."

[49]See Foote, *supra* note 8, at 406-07. In this article Foote

(This footnote is continued on the next page)

that merely stating that the proper test is probable cause does not, *ipso facto,* create a formula which can intuitively be applied to the facts of a particular case. We submit that the establishment of concepts underlying a standard less than probable cause is no more difficult than the establishment of the concepts underlying probable cause itself. Indeed we should hope that difficulties in conceptualizing a standard would not lead to judicial abnegation of this Court's clear duty.

Recently a commentator undertook just this task of analytically probing the conceptualization which would be involved in establishing a standard for temporary field detention as well as setting forth the constitutional validity of such standard.[50] After undertaking this task, the author concludes as follows:

> "The thesis of this paper is that a more flexible compromise than today exists between the right of privacy and legitimate police desires can be reached within the framework of the Fourth Amendment. The standard of 'probable cause' does not seem to have satisfactorily done its job. The result has been a hodgepodge of 'vagrancy' statutes which often do little more than to make 'being suspicious' a crime and widespread evasion of the law. It would be far better to face the issue squarely and set up a system of intelligent safeguards which protect the security of the individual and, at the

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rails against the claimed ambiguity of standards less than probable cause to arrest, as if the concept of probable cause is so clear to every Justice of this Court that it would never have caused controversy within the Court in past cases.

[50]See Leagre, *supra* note 9.

same time, do not unduly restrict the police in the performance of their duties.

"Conceptually, this flexibility can be justified within the Fourth Amendment by the detention-arrest distinction and a reliance upon the broad provision contained in the Amendment's first clause. A test of reasonableness under all the circumstances may be the only solution to the present problem which can honestly be said to fulfill the policy of the constitutional provision.

"The sole objection to such a test must necessarily lie in its vagueness. Doubtless, this would present some difficulty in initial application. Yet there is no reason to suspect that the Court would be incapable of eliciting fundamental standards through a process of judicial inclusion and exclusion. Thus it would seem difficult to conclude that the vice of vagueness is a sufficient reason for discarding a formulation of reasonableness under all the circumstances; a certain amount of such vagueness is rather of the essence of a constitutional principle."[51]

A similar innovation in the law of search and seizure has been taken by this Court with respect to the concept of probable cause itself. For example, in *Camara v. Municipal Court,*[52] this Court tempered probable cause for a search warrant with reasonableness by holding that "reasonableness is still the ultimate standard."[53] This seems to clearly compel the conclusion that the controlling concept in the Fourth Amendment

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[51]*Id.* at 419-20.
[52]387 U.S. 523 (1967).
[53]*Id.* at 539.

is the standard of reasonableness and not the standard of probable cause alone, since the Fourth Amendment's requirement of probable cause for search warrants is on its face an absolute requirement and could conceivably have been interpreted without the applicability of the concept of reasonableness which is found in a separate clause of that amendment.[54]

As a final note to the question of whether or not such an investigative practice as temporary field detention is constitutional, we would recall the words of this Court in *Miranda v. Arizona,*[55] which were as follows:

> "General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement."[56]

These words would be hollow indeed if all they meant was that while the Fifth Amendment does not prohibit temporary field detention, the Fourth Amendment does.

B. A Constitutional Standard for a Protective Patdown Should Be Upheld.

If, as we urge, this Court adopts a constitutional standard authorizing the practice of temporary field detention, it would be "cruel and unusual punishment" to permit the former practice without the necessary protection of a protective patdown. In a day and age where attacks are being made upon the right of society

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[54]See the discussion of the relationship of the two clauses in Leagre, *supra* note 9, at 396-03.

[55]384 U.S. 436 (1966).

[56]*Id.* at 477-78.

to lawfully impose the death penalty on the ground that its imposition is "cruel and unusual punishment,"[57] we should hope that the advocates of the abolition of the death penalty would have as much concern for those who enforce society's law as they do for those who enforce the law of the jungle. Recent statistics indicate that the concern of police officers for their own safety is not phantasmagoric.[58] The report of the President's Commission discloses that 20% of the persons upon whom police officers used a protective patdown were carrying either guns or knives.[59] We doubt that one out of every five citizens in this country is carrying a similar deadly weapon and thus we submit it is reasonable for the police to single out for protective patdown that category of persons whom they stop pursuant to a constitutional standard for temporary field interrogation.

We recognize that the protective patdown, albeit initially an attempt to protect the life of the officer, may culminate in a criminal charge solely based upon physical evidence which was discovered as a result of that

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[57]See, *e.g.*, *Hill v. Nelson*, 271 F. Supp. 439 (N.D. Cal. 1967).

[58]The Uniform Crime Reports for 1966 released by the Federal Bureau of Investigation in a publication entitled, *Crime in the United States*, discloses at pages 45-46 that during the years 1960-1966, 41 police officers were killed while "investigating suspicious persons and circumstances." This number of police officers constitutes 12% of all the officers killed by felons during this period of time. In accord with the recent rising trend of crime, the number of police officers killed in 1966 "by persons whom the officers had stopped for investigation or interrogation because of suspicion regarding their actions" was 18% of the total officers killed in 1966 (57 law enforcement officers). FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 45-46 (1967).

[59]See THE CHALLENGE OF CRIME IN A FREE SOCIETY, *supra* note 31, at 94-95.

patdown. This is true in the trilogy of cases now pending before this Court. It should be noted, however, that this is by no means as common as this trilogy of cases would indicate.[60] The right to engage in a protective patdown should obviously extend no further than the purpose for which it was conducted. Thus we would require a constitutional standard to be established for the protective patdown which would be reasonably related to the purpose of that patdown. We do not condone an intensive search which evidences a desire to explore hidden places for the purpose of finding evidence other than a weapon which may be dangerous to the safety of the officer. The factual situation underlying each case will determine whether or not this constitutional standard underlying a protective patdown has been met.[61]

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[60]The representative recent leading cases set forth in our appendix disclose that of the 23 cases, in only 4 cases (including 2 of the cases now before this Court) was physical evidence introduced which had been found during the course of a protective patdown of the defendant's person. These cases are *People v. Peters,* 18 N.Y. 2d 238, 273 N.Y.S. 2d 217, 219 N.E. 2d 595 (1966); *State v. Terry,* 5 Ohio App. 2d 22, 214 N.E. 2d 114 (1966); *Commonwealth v. Hicks,* 209 Pa. Super. 1, 223 A. 2d 873 (1966); *Wilson v. Porter,* 361 F. 2d 412 (9th Cir. 1966).

[61]In *State v. Terry,* 5 Ohio App. 2d 122, 214 N.E. 2d 114 (1966), the following was stated:

> "However, we must be careful to distinguish that the 'frisk' authorized herein includes only a 'frisk' for a dangerous weapon. It by no means authorizes a search for contraband, evidentiary material, or anything else in the absence of reasonable grounds to arrest. Such a search is controlled by the requirements of the Fourth Amendment, and probable cause is essential. White v. United States (1959), 106 U.S. App. D.C. 246, 271 F. 2d 829. Therefore, we hold that, on the facts presented in the instant case, the 'frisk' for dangerous weapons was valid as an incident to a valid inquiry by the police. Each case must be decided upon its own facts." 5 Ohio App. 2d at 130, 214 N.E. 2d at 120.

C. Evidence Recovered as the Result of a Protective Patdown Which Meets the Necessary Constitutional Standards Should Be Admissible.

In order to place the issue of admissibility of evidence recovered as the result of a protective patdown in its proper perspective, it must be remembered that we urge a constitutional standard for such a protective patdown which will not automatically authorize a protective patdown during every temporary field detention. The reasoning underlying the nonadmissibility of such evidence appears to be that by making inadmissible all evidence recovered, whether lawfully or unlawfully, some pressure to engage in protective patdowns which do not meet constitutional standards will have been alleviated. Such argument, although perhaps superficially appealing, is patently fallacious.

At the present time police officers who are conscientiously attempting to perform their duty (such as is apparently the case in Philadelphia, as noted above)[62] will engage in a protective patdown only when it is necessary for their own protection, and not as a subterfuge for a general exploratory search. If this Court, however, indicates to the police that it makes no difference whether or not the protective patdown meets constitutional standards insofar as the admissibility of evidence is concerned, what would deter any policeman from always engaging in a protective patdown, even if it does not meet constitutional standards? This Court, if it holds that police may engage in protective patdowns which meet a constitutional standard but that the evidence recovered thereby is inadmissible, instead of prohibiting the abuse of this practice will have placed

[62]See II,A,3 *supra*.

a premium upon its use in all situations. In short, if this Court hold that protective patdowns which meet a constitutional standard are to be recognized, it must necessarily follow that the evidence recovered thereby must also be admissible if an irrational dichotomy leading to police abuse is not to follow.

Additionally, it should be noted that although the trilogy of cases presently pending before this Court all involve evidence recovered during a protective patdown, a substantial amount, if not the majority of evidence discovered during a temporary field detention, is obtained by methods solely unrelated to a protective patdown.[63] Unless this Court were to rule that all evidence obtained during a temporary field detention is inadmissible, we submit that there is no logical nor practical basis for distinguishing between the methods whereby evidence is recovered during that detention so long as the methods meet constitutional standards. Thus, if during a temporary field detention which meets constitutional standards, an officer visually observes narcotics which have been thrown away by the suspect or known stolen property in a vehicle containing the suspect, what justification can there be for admitting this type of evidence and not admitting that which is obtained by a protective patdown conducted in a constitutional manner? On the other hand, if this Court were to hold that no evidence whatsoever which is recovered during a temporary field detention is admissible, the underlying purpose of the detention, namely, to investigate possible criminal conduct, will have been defeated. The form of temporary field detention will exist but not its substance (except for verbal state-

[63]See note 60 *supra*.

ments made by a defendant, an issue which is not discussed herein).[64]

Finally, it should be noted that in those situations where evidence is recovered during the protective patdown, in an overwhelming majority of cases it constitutes the very item for which the officer was seeking, namely, a dangerous weapon.[65] Thus, the admission of such weapons as evidence is merely consistent with the purpose underlying the protective patdown.[66] Indeed, in an age where society has shown a concern for the availability of dangerous weapons,[67] one would question judicial policy prohibiting the admissibility of such evidence if discovered during a protective patdown comporting to constitutional standards.

III.

CALIFORNIA HAS ESTABLISHED WORKABLE CONSTITUTIONAL STANDARDS FOR TEMPORARY FIELD DETENTION AND PROTECTIVE PATDOWN.

We have pointed out previously that the concept of probable cause is not an absolute standard capable of intuitive perception. It is a judgment which is inherently flexible while at the same time permitting constitu-

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[64]See note 4 *supra*.

[65]See *2 Field Surveys III*, Section I, *supra* note 32, at 87 (the designation "personal searches" at page 87 is deemed to be the equivalent of a protective patdown).

[66]The amount of non-dangerous weapons discovered in a search is insignificant. *Ibid.* This would seem to indicate that this procedure is not a very fruitful subterfuge if one assumes it is being used as a subterfuge.

[67]See S.1, 90th Cong., 1st Sess. (1967), presently before Congress (the so-called "Dodd Firearms Bill"); See also THE CHALLENGE OF CRIME IN A FREE SOCIETY, *supra* note 31, Chapter 10: Control of Firearms.

tional judgment. Similarly, we contend that constitutional standards for temporary field detention and protective patdown can be established which would produce distinctions of constitutional magnitude and which need not be cloaks covering conduct violative of human dignity.

The use of a constitutional standard less than probable cause to arrest does not require that temporary field detentions and protective patdowns be conducted on police hunches, uncontrollable by judicial scrutiny. Just as the courts are able to distinguish those facts which constitute probable cause for an arrest from those which do not constitute such probable cause, so we are confident they can distinguish those facts which meet a constitutional standard for temporary field detention and protective patdown from those which do not. In this regard there may be cases in which the courts have erred in applying this distinction, as well as some jurisdictions where the courts may have completely failed to draw such distinctions. Such judicial error should not be reason for complete abnegation of judicial power with respect to this important issue.

Of all the jurisdictions which have upheld temporary field detention and protective patdown on a standard less than probable cause to arrest, the appellate courts of the State of California have undoubtedly had the most opportunity to develop and apply constitutional standards capable of distinguishing proper and improper police practices in this area. This is true in part because of the judicial recognition of this conduct for a number of years, as well as the large number of decisions which have arisen litigating the concepts under-

lying the system. Thus we have chosen California as a model jurisdiction[68] for the purpose of convincing this Court that the judiciary are capable of applying constitutional standards less than probable cause to arrest which can distinguish those practices which are proper and those which are improper.[69] We thus propose to undertake the task requested by a recent commentator:

> "If probable cause is no longer to be the test, at least at the initial point of arrest, where is the line to be drawn short of indiscriminate police detentions on hunch? No greater service could be rendered to advocates of change in the law than the formulation of specific standards illuminating the limits of the proposed buffer zone which would lie between arrest on probable cause and the protection of the individual from intrusion based on nothing more substantial than a policeman's hunch."[70]

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[68]As in other states, there may be decisions in California which have been erroneously decided on their facts or which fail to draw necessary constitutional distinctions with respect to temporary field detention and protective patdown. This does not mean, however, that the California courts do not have the necessary tools to apply this system properly or that on other occasions it has not been applied properly by the California courts. Similar mistakes by California with respect to search and seizure in other areas (see, *e.g., Stoner v. California,* 376 U.S. 483 (1964), and *Cooper v. California,* 386 U.S. 58 (1967)) have not tarnished the renowned reputation and standing of the California courts, especially the California Supreme Court.

[69]Similar consideration of California occurred in *McCray v. Illinois,* 386 U.S. 300 (1967), in which an *amicus curiae* brief, deemed by this court to be "helpful," discussed the experience of California. 386 U.S. at 306, n.7.

[70]Foote, *supra* note 8, at 407.

A. When Can a California Citizen Be Subjected to a Temporary Field Detention?

The test established by the California Supreme Court for temporary field detention is as follows:

> "It is well established that a police officer in the discharge of his duties may detain and question a person when the circumstances are such that would indicate to a reasonable man in a like position that such a course is necessary to proper discharge of those duties."[71]

Lest it be thought that such a test is so imprecise as to permit blanket authorization for police conduct based on "hunches," one need only consider the facts and holding of the case in which this rule was announced. In *People v. One 1960 Cadillac Coupe*[72] a private citizen found in a public place a kit containing apparatus used in administering narcotics and reported this to the police. During an investigation of this discovery, a police officer saw defendant drive through an adjacent area in a 1960 Cadillac. The officer felt defendant was out of place in the Cadillac and thus watched him closely. Defendant acted nervous and watched the officer in the rear view mirror. He drove out of the alley and parked immediately across the sidewalk from where the kit had been found. He left the car and walked over to a barber shop, stopping to look in the window. He then returned in the direction of his car. At this point he was stopped by the officer and was nervous and evasive in answering questions. The defendant lied about a prior arrest and denied

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[71] *People v. One 1960 Cadillac Coupe,* 62 Cal. 2d 92, 95-96, 396 P. 2d 706, 708 (1964).

[72] *Ibid.*

knowledge of the kit. Thereafter, through a set of circumstances irrelevant to this brief, narcotics were found on his person.

The California Supreme Court held the initial stopping unlawful for the following reasons:

> "In the instant case the officers observed only that defendant was nervous, appeared to be wary of them, and that he parked his car adjacent to the point where the kit was found and thereafter took a rather aimless walk in the near vicinity. Further observations by the arresting officer to the effect that Reulman looked like an untruthful person and as though he did not belong in the Cadillac are not impressive and appear to add little to create any real suspicion, even when we consider that the officer was an experienced narcotics investigator, familiar with the conduct of suspects in like circumstances. (See *People v. Cowman,* 229 Cal. App.2d 109 [35 Cal.Rptr. 528].) We find little, if anything, to distinguish Reulman from any other harried citizen who may have innocently parked his automobile in the same spot as did Reulman. The trial judge's finding that reasonable cause for detention and questioning is lacking is thus substantially supported by the record.[73]

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[73] *Id.* at 96; 396 P. 2d at 709. See also *People v. Henze,* 253 A.C.A. 1083, ... Cal. Rptr. .... (1967) and *People v. Hunt,* 250 A.C.A. 377, 58 Cal. Rptr. 385 (1967), in each of which the Court held the officer did not have sufficient cause to engage in a temporary field detention. It should be noted that in addition to these reported cases in which the temporary field detention was declared unlawful, there are additional appellate cases in California so holding which are not reported in an official reporter because of the rule in California that not all decisions need

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B. When Can a California Citizen Be Subjected to a Protective Patdown?

The test established by the California Supreme Court for a protective patdown is as follows:

> "If the circumstances warrant it [a police officer] may in self-protection request a suspect to alight from an automobile or to submit to a superficial search for concealed weapons."[74]

Here again, lest it be thought that such a test is so imprecise as to fail to permit distinctions of constitutional magnitude, one need only consider the facts and holding of the case in which this rule was announced. In *People v. Mickelson*[75] an officer had gone to a market where a robbery had just been reported. The robber was described as a fairly tall white man of large build with dark hair wearing a red sweater and armed with a .45 automatic. While driving away from the market 20 minutes later the officer saw a station wagon coming toward him with two persons in it. This was about six blocks from the market. The driver matched the description of the robber. The station wagon proceeded to drive around the area making numerous turns. The officer overtook the station wagon and observed the passenger, the defendant in this case, bend forward in the seat, forward and down and raise

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be published. (See, for an example of such an unreported ruling striking down a temporary field detention, *People v. Dresslar*, Crim. No. 12345 (1966), decided by the Court of Appeal, Second Appellate District, Division 4.) Additionally, trial courts in California are not required to render any written opinion in cases where, because of an unlawful temporary field detention or protective patdown, they refuse the admissibility of evidence, resulting in the acquittal of the defendant.

[74] *People v. Mickelson,* 59 Cal. 2d 448, 450, 380 P. 2d 658, 660 (1960).

[75] *Ibid.*

back up. The officer stopped the station wagon. While the officer was radioing for assistance, the driver walked back to talk to him. The driver stated that he was trying to get home, was lost and was looking for a freeway. The assisting officers arrived. Defendant, a passenger in the car, got out of the car on the request of the police. The police then looked in the car and an overnight bag was found stuffed under the right front seat. The bag was opened and found to contain four screwdrivers, a flashlight, a pair of gloves, and two socks, one of which was full of nickels, dimes and quarters later determined to have been burglarized from telephone booths. Defendant and the driver were arrested on suspicion of burglary. The officer stated that his purpose in examining the bag was the possibility of a gun being there.

The California Supreme Court held as follows:

> "Both occupants were out of the car away from any weapons that might have been concealed therein. Instead of interrogating Zauzig [the driver] and defendant with respect to the robbery or requesting them to accompany the officers the few blocks to the market for possible identification, the officer elected to rummage through closed baggage found in the car in the hope of turning up evidence that might connect Zauzig with the robbery. That search exceeded the bounds of reasonable investigation."[76]

[76] *Id.* at 454; 380 P. 2d at 662.

C. In Those Situations Where a Protective Patdown Is Permissible, to What Degree of Probing Must a California Citizen Be Subjected as Part of the Protective Patdown?

The California Supreme Court has, so far, not had occasion to verbalize a test for the degree of probing permissible as an incident of a protective patdown. However, at least one court of appeal has discussed this problem and has made a significant constitutional distinction between proper and improper practices.

In *People v. Martines*[77] two officers noticed defendant and two companions at 1:15 a.m. walking through an unlighted alley at the rear of a closed business area. The officers stopped defendant and asked him for identification. Defendant stated that he had none. One officer made a cursory search of defendant due to the darkness in the alley and for his own safety. The search was only of the outside of defendant's clothing. The officer felt an object that appeared to be a knife in defendant's pocket. In attempting to remove the knife he removed a paper wad which was found to contain 9 marijuana cigarettes. Defendant made no threatening moves or offensive or aggressive statements. The object thought possibly to be a knife was a combination metal nail file-bottle opener. When closed it was ½ inch wide, ½ inch thick and 2¼ inches long. When opened it contained a small blade, a nail file and a bottle opener.

The Court of Appeal stated as follows:

> "In the circumstances a cursory search was warranted. Nothing was revealed by the cursory

[77]228 Cal. App. 2d 245, 39 Cal. Rptr. 526 (1964).

search which warranted the officer in emptying appellant's pocket as he did. . . .

"In the case at bar it seems that the cursory search made should have reassured the officer rather than have alarmed him."[78]

From the above study of California cases it is apparent that those who would detract from the feasibility of establishing a constitutional standard for temporary field detention and protective patdown on the ground that it is impossible to establish a standard which will be capable of distinguishing proper from improper police conduct simply do not give the judiciary due credit for their abilities.

CONCLUSION.

It would be naive to state that members of minority groups are never harassed by the practice of temporary field detention and protective patdowns. It is just as naive to tell policemen that they do not need to use either of these practices in their work. Irrespective of the degree of truth in either of these statements, undoubtedly each of these opinions is the prevailing view

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[78] *Id.* at 248; 39 Cal. Rptr. at 528. *Accord, People v. Simon,* 45 Cal. 2d 645, 290 P. 2d 531 (1955), wherein the California Supreme Court, although not stating any general rule relating to the intensity with which a protective patdown could be conducted, applied its conception of such intensity in the following language:

"Even if it were conceded that in some circumstances an officer making such an inquiry might be justified in running his hands over a person's clothing to protect himself from an attack with a hidden weapon, certainly a search so intensive as that made here could not be so justified. . . . In the present case the officer searched first and asked questions only after his search uncovered the incriminating cigarette, and there is nothing to indicate that had he confined himself to a reasonable inquiry, he would have discovered anything to confirm his suspicion that defendant had no lawful right to be where he was." 45 Cal. 2d at 650, 290 P. 2d at 534.

within the particular group under consideration, *i.e.*, the minority groups and the policemen. It would certainly be worthy of the dignity of the law if it could give recognition to both these views in such a way as to accommodate both. This would truly benefit minority groups as well as policemen in their respect both for each other and for the law. Thus there would be "no war between the Constitution and common sense."[79]

Respectfully submitted,

BRENDAN T. BYRNE,
County Prosecutor, Essex County,
Court House,
Newark, New Jersey 07102,

CHARLES MOYLAN, JR.,
State's Attorney, City and County of Baltimore,
204 Court House,
Baltimore, Maryland 21202,

EVELLE J. YOUNGER,
District Attorney, Los Angeles County,
600 Hall of Justice,
Los Angeles, Calif. 90012,

Amicus Curiae Committee for the
NATIONAL DISTRICT ATTORNEYS ASSOCIATION.

Of Counsel:
HARRY WOOD,
Chief, Appellate Division,
HARRY B. SONDHEIM,
Deputy District Attorney,
Los Angeles County,
600 Hall of Justice,
Los Angeles, Calif. 90012.

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[79] *Mapp v. Ohio*, 367 U.S. 643, 657 (1961).